United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-7294

United States Court of Appeals
FOR THE SECOND CIRCUIT

Case No. 75-7294

NATIONAL LIFE INSURANCE COMPANY,
Plaintiff-Appellee,

against

IRENE SOLOMON and LOUIS SCHUSTER as Trustee of the S & L Pe[illegible] Trust-R.T.B. Industries, Inc.,
Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF OF NATIONAL LIFE INSURANCE COMPANY, PLAINTIFF-APPELLEE

LEBOEUF, LAMB, LEIBY & MACRAE
Attorneys for National Life Insurance Company
140 Broadway
New York, New York 10005

Of Counsel:

CHARLES P. SIFTON
JAMES A. FITZPATRICK, JR.

Dated: September 29, 1975

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

United States Court of Appeals
FOR THE SECOND CIRCUIT

Case No. 75-7294

NATIONAL LIFE INSURANCE COMPANY,
Plaintiff-Appellee,

against

IRENE SOLOMON and LOUIS SCHUSTER as Trustee of the S & L Pension Trust-R.T.B. Industries, Inc.,
Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF OF NATIONAL LIFE INSURANCE COMPANY, PLAINTIFF-APPELLEE

Issues Presented for Review*

1. Whether the Judge below erred in holding that failure of the insured, Herbert Solomon, to disclose in his application for life insurance his hospitalization for and diagnosis of arteriosclerotic heart disease with angina pectoris, as well as a fifteen year history of chest pains,

* Appellants have failed in their brief to comply with Rule 28(a)(2) of the Federal Rules of Appellate Procedure, which requires a statement of the issues presented for review. Appellee therefore submits a statement of issues pursuant to Rule 28(b) of said Rules.

electrocardiogram examinations and consultations with physicians related thereto, constituted a material misrepresentation as a matter of law.

2. Whether the Judge below erred in holding that appellee National Life Insurance Company was not estopped from rescinding its life insurance policy on the life of Herbert Solomon because of its alleged neglect in failing to elicit Mr. Solomon's true medical history from his family physician prior to issuing the policy on his life.

3. Whether the Judge below erred in holding that National Life Insurance Company was not estopped from rescinding its life insurance policy on the life of Herbert Solomon as a result of a remark, alleged to have been made to Herbert Solomon by an agent or sub-agent of said Company, urging him not to worry about untrue answers on his application for life insurance.

Statement of the Case

Nature of the Case

This case involves the recission of a policy of life insurance issued by appellee National Life Insurance Company of Montpelier, Vermont ("National Life") upon the life of Herbert Solomon. The policy, which bore a face value of $240,792, was rescinded by National Life as a result of material misrepresentations made by Mr. Solomon in his application to National Life for life insurance.

Proceedings Below

An action to rescind the policy in question was commenced by National Life in the United States District Court, Eastern District, New York on October 11, 1974 (R. 3a, 5a).* Named as defendants (herein appellants)

* References to the Appendix herein are made by the letter "R" and to the Appellants' Brief by the letters "App. Br." followed by the numerical page reference.

were Irene Solomon and Louis Schuster as Trustee of the S & L Pension Trust-R.T.B. Industries, Inc., the beneficiary and the owner of the policy, respectively.

In its Complaint and First Amended Complaint, National Life alleged that Herbert Solomon had made misrepresentations as to his medical history and more particularly that he had failed to disclose his long-standing heart condition and consultations and treatments therefor on his application for life insurance and an amendment thereto, and that these misrepresentations were material as a matter of law (R. 6a-9a, 13-16a). Accordingly, National Life asked that the policy be judicially rescinded and returned for cancellation and it further asked that defendants Solomon and Schuster be perpetually restrained from commencing or prosecuting any action to recover under its terms (R.10a-11a, 17a-18a).

In the action below, National Life made a motion for summary judgment before Senior United States District Judge Walter Bruchhausen, praying for the relief demanded in its Complaint and First Amended Complaint (R. 19a-20a).

Decision and Judgment Below

On March 31, 1975, Judge Bruchhausen granted National Life's motion for summary judgment (R. 82a). In so doing, Judge Bruchhausen held that the misrepresentations made by Herbert Solomon in his application for life insurance were material as a matter of law (R. 86a) and that National Life did not in any way have prior notice of Mr. Solomon's true medical history (R. 87a).

On April 16, 1974, Judge Bruchhausen signed an Order granting National Life's motion for summary judgment and directing that a judgment be entered rescinding the policy on Mr. Solomon's life, ordering the defendants, Mrs. Solomon and Mr. Schuster, to surrender the policy to National

Life for cancellation, perpetually staying the counterclaim filed by Solomon and Schuster for the proceeds of the policy and perpetually restraining them from commencing any action on account of or under said policy (R. 90a-91a). Said judgment was entered on April 21, 1975 (R. 92a-93a) and defendants Solomon and Schuster filed a Notice of Appeal on May 9, 1975 (R. 2a).

Background of the Case

Herbert Solomon made formal application to National Life Insurance Company on March 20, 1973 for a Life insurance policy in the amount of $240,792 (R. 6a, 13a, App. Br. 2). In accordance with standard company procedure, Mr. Solomon was given a medical examination on March 27, 1973 (21a, 24a). Mr. Solomon was examined on that date by Dr. Nicholas Kuzmowycz and Dr. William J. Godfrey at their offices in Babylon, New York (*Ibid*). These examinations were separately conducted and in each case the applicant, Herbert Solomon, was asked a series of questions relating to his health and medical history by the examining doctor (R. 22a, 25a). These questions were printed on Part B of the standard National Life policy application form (Answers Made to Medical Examiner) (R. 23a). Mr. Solomon's answers to the questions were recorded by the examining doctor during each examination and the application forms were then signed, in each case, by Mr. Solomon and the examining doctor (R. 22a, 25a). Immediately above the signature of Herbert Solomon on the application forms, there appeared the following:

> "I have read the answers to the foregoing questions, they are correctly recorded and they are complete and true, to the best of my knowledge and belief." (R. 9a, 16a, 23a)

One of the questions listed on Part B of Herbert Solomon's application for life insurance asked whether or not, to the best of his knowledge, he had ever had—

> "Fainting, palpitation, pain around the heart, high blood pressure, heart murmur, rheumatic fever, shortness of breath, or any other indication of disease of heart or arteries?" (R. 7a, 14a, 23a)

In response to this question when it was asked of him by both doctors, Herbert Solomon answered "No". (R. 7a, 14a, 23a, App. Br. 2).

Another question on Part B of Herbert Solomon's application asked—

> "Have you had x-rays or electrocardiograms made during the last five years?" (R. 7a, 14a, 23a)

In response to this question when asked by Doctors Godfrey and Kuzmowycz, Herbert Solomon answered "No" (R. 7a, 14a, 23a, App. Br. 2).

Another question on Part B of Mr. Solomon's application asked—

> "Have you consulted any physician or other practitioner for advice, treatment or examination within the last five years?" (R. 7a, 14a, 23a).

Again, Mr. Solomon responded by saying "No" when he was asked this question by both doctors (R. 7a, 14a, 23a, App. Br. 2).

It is undisputed that as the result of a standard investigation conducted by National Life prior to issuing a policy of insurance on the life of Herbert Solomon, it was learned that Mr. Solomon had a family physician, Dr. Karl Friedman of Freeport, New York (App. Br. 3).

National Life sent Dr. Friedman a questionnaire regarding all examinations or treatments he may have performed on Herbert Solomon. Dr. Friedman, however, did not disclose to National Life all of Mr. Solomon's visits to him. What Dr. Friedman's report to National Life did

state was that Dr. Friedman had administered a single EKG test during the course of his engagement as Herbert Solomon's family physician and that his heart, when examined during the course of two check-ups, was normal (*Ibid*).

Upon receipt of this report from Dr. Friedman and the application forms referred to above, Mr. Solomon's application for life insurance was reviewed on May 25, 1973 by Dr. Brian McCracken, one of the three Medical Directors at National Life (R. 30a). After examining Herbert Solomon's application, Dr. McCracken recommended approval of the application and indicated that approval to the Underwriting Department of National Life (R. 31a).

Mr. Solomon's application was then examined by Rowland Ricketts, Jr., Assistant Director of Underwriting at National Life (R. 28a). On the basis of statements made by Mr. Solomon in his application and upon the approval of Dr. McCracken, the Medical Director of National Life, Mr. Ricketts approved Mr. Solomon's application on May 25, 1973 (R. 28a).

At the request of National Life, Mr. Solomon signed a Request for Amendment of Application prior to the issuance and delivery of his policy (R. 14a, App. Br. 2). Mr. Solomon's amended answer to the question asking whether or not he had consulted any physician for advice, treatment or examination within the last five years was affirmative, that he had visited Dr. Karl Friedman for "checkups and minor complaints" from 1961 through 1972 and that the results of all such examinations were normal (R. 14a, App. Br. 2, 3).

After Mr. Solomon signed the Request for Amendment of Application, National Life issued Policy No. 1462937 on his life (R. 6a, 13a, App. Br. 3). The date of issue of the policy was predated from June, 1973 to November 30, 1972 at Mr. Solomon's request (R. 6a, 13a, 77a).

Mr. Solomon died on September 8, 1973 (App. Br. 2).* Since the date of his death was within two years of the date of issuance of the policy, the routine investigation which is conducted in all such cases was undertaken for National Life by the Retail Credit Company. As a result of this investigation, National Life learned significant facts regarding Mr. Solomon's actual medical history which had not been disclosed by him in his application for life insurance. More particularly, it learned of his long-standing heart condition, his examinations and treatments therefor and finally his five day hospitalization, immediately prior to his application for life insurance, for arteriosclerotic heart disease with angina pectoris.

National Life's investigation first revealed that Mr. Solomon's many visits to Dr. Karl Friedman were not for simple "check-ups" but instead had been precipitated by recurrent severe chest pains and that electrocardiogram tests had been performed on Mr. Solomon during nearly all of his visits to Dr. Friedman (R. 33a, 34a, 35a).

On October 31, 1957, Dr. Friedman examined Herbert Solomon at Mr. Solomon's home, where he was complaining of severe chest pains (R. 33a). At that time, Dr. Friedman was informed by Mr. Solomon that he had undergone an electrocardiogram test at French Hospital two days before (R. 34a). Herbert Solomon visited Dr. Friedman's office four days after Dr. Friedman's house call, on November 4, 1957, where he again underwent an electrocardiogram examination. (*Ibid.*)

Herbert Solomon was again given an electrocardiogram test at Long Island Jewish Hospital on February 4, 1962 (*Ibid*). On March 12, 1962 and on August 13, 1965, Herbert Solomon returned to Dr. Friedman's office complaining of

* It is undisputed that the lack of relationship between the condition misrepresented and the cause of death has no bearing on the insurance company's right to rescind. *Greene* v. *United Mutual Life Insurance Company*, 38 Misc. 2d 728, 238 N.Y.S.2d 809, *aff'd.* 23 App. Div. 2d 720, 258 N.Y.S.2d 323 (Sup. Ct. Bronx County 1963).

chest pains and electrocardiogram tests were performed on both occasions (*Ibid*).

On August 28, 1967, Mr. Solomon returned to Dr. Friedman's office complaining of chest pains and indicating that he had undergone an electrocardiogram examination three months before (*Ibid*). Mr. Solomon thereafter underwent a chest x-ray and an electrocardiogram examination at Brookdale Medical Center, Brooklyn, New York on September 19, 1967 (*Ibid.*).

On August 19, 1968, Mr. Solomon returned to Dr. Friedman's office complaining of chest pains and underwent an electrocardiogram examination on that date as well as on May 6, 1971, when he again visited Dr. Friedman (R. 35a).

Mr Solomon last visited Dr. Friedman on May 8, 1972, when he again complained of chest pains and again underwent an electrocardiogram examination (*Ibid*).

National Life's investigation finally revealed that Mr. Solomon had been admitted to Doctors Hospital in Freeport, New York on November 29, 1972 (R. 35a, 37a). Mr. Solomon remained in Doctors Hospital thereafter until December 3, 1972 and while there was under the care of Dr. Edward I. Braverman (*Ibid*).

Upon Mr. Solomon's admission to Doctors Hospital, Dr. Braverman found that his symptoms were intermittent chest pains radiating to the left arm, which pains were aggravated by respiration (R. 37a). Dr. Braverman's admitting diagnosis of Mr. Solomon was that he had suffered a possible coronary (*Ibid*).

While in the hospital, Mr. Solomon underwent serial EKGs and a chest x-ray examination and was treated with valium and intravenous fluids (*Ibid*). When Mr. Solomon was discharged on December 3, 1972, he was given a a prescription for Nitrostat and Nitrospan by Dr. Braverman (*Ibid*).

Upon discharge, Dr. Braverman's diagnosis of Mr. Solomon's condition was that he was suffering from arteriosclerotic heart disease with angina pectoris, class II-B (*Ibid*).

As the record below established without dispute from appellants, arteriosclerotic heart disease is a condition of the arteries which supply blood to the heart. It is characterized by a hardening and thickening of artery walls accompanied by a loss of elasticity, all of which result in a reduction of the nourishment which goes to the heart. Angina pectoris is chest pain which arises suddenly and intermittently as a result of an increased demand by the heart, which cannot be met due to the thickening and hardening of the arteries and is directly relevant to an assessment by a doctor in determining how long a patient may be expected to live. Other symptoms of arteriosclerotic heart disease are dyspnea, which means shortness of breath or labored breathing, and palpitations, which is a fluttering of the heart or an abnormally rapid beating of the heart which is felt by the patient. Class II-B means that although the patient may have some symptoms, he need not restrict his normal daily activity. Other terminology often employed to indicate the same condition as arteriosclerotic heart disease with angina pectoris includes coronary heart disease and coronary insufficiency (R. 31a-32a).

Contrary to appellants' statement at pages 3 and 11 of their brief, Mr. Solomon had consulted with Dr. Braverman prior to his hospitalization—and indeed after his hospitalization for that matter (R. 36a, 37a, 38a). Dr. Braverman examined Herbert Solomon at his office on February 15, 1967, at which time Mr. Solomon was complaining of chest pains and an ulcer condition (R. 36a). Dr. Braverman performed an electrocardiogram test on that date (*Ibid*).

After his hospitalization, but before formally applying to National Life for life insurance on March 20, 1973, Mr. Solomon returned twice to consult with Dr. Braverman regarding his heart condition, on February 7, 1973 and March 8, 1973 (R. 37a, 38a). During the February 7, 1973 visit, an electrocardiogram examination was performed (R. 37a). Mr. Solomon's final visits to Dr. Braverman, which took place on April 11, 1973 and June 11, 1973, came after his formal application to National Life but before his completion of the Request for Amendment of Application and before the issuance of his policy on June 29, 1973 (R. 6a, 13a, 14a, 38a).

Had the foregoing medical history been known to National Life, it would not have issued the policy in question. A medical history which includes a diagnosis of arteriosclerotic heart disease with angina pectoris is directly relevant in determining how long a patient is likely to live (R. 32a). Dr. Brian McCracken, Medical Director of National Life, stated in his affidavit that had he known that Herbert Solomon had ever been hospitalized for or diagnosed as having suffered from arteriosclerotic heart disease, he would not have recommended approval of his application for the policy issued as a matter of standard procedure (R. 32a).

Rowland Ricketts, Jr., Assistant Director of Underwriting of National Life, stated in his affidavit that had he been aware of Herbert Solomon's actual medical history —the recurring chest pains from which he had suffered for approximately fifteen years and for which he had consulted physicians and undergone numerous electrocardiogram examinations as well as his hospitalization and diagnosis of arteriosclerotic heart disease with angina pectoris —and if a Medical Director of National Life had recommended disapproval of Herbert Solomon's application, as a matter of standard procedure he would have refused on

behalf of National Life to enter into the contract of insurance at issue herein (R. 29a).

When the misrepresentations made by Mr. Solomon in his application were uncovered, National Life elected to rescind the policy. This was done by way of a letter dated December 20, 1973 addressed to S&L Pension Trust—R.T.B. Industries, Inc., which letter contained a check for $12,979.07, representing return of the premiums paid plus interest (R. 9a, 17a).

Mrs. Solomon and Mr. Schuster refused National Life's tender of premiums and interest by letter of their attorney dated January 18, 1974 (R. 10a, 17a). National Life's check was returned by letter of February 8, 1974 (*Ibid*).

National Life then brought its action to rescind the policy of insurance on October 11, 1974 (R. 3a, 5a).

Appellants' Case Below

In their papers responding to National Life's motion for summary judgment, defendants Solomon and Schuster contended that the misrepresentations made by Mr. Solomon were not material as a matter of law (R. 41a, 66a). They also urged that National Life had been put on constructive notice of Mr. Solomon's true medical history when, as a result of its own investigation, it learned the name of his personal physician and some of the dates and results of Mr. Solomon's visits to said doctor (R. 66a, 79a). The final argument made by Solomon and Schuster was that an alleged disclosure of Mr. Solomon's true medical history to an agent or subagent of National Life constituted constructive notice such as to estop National Life from rescinding Mr. Solomon's policy (R. 60a, 62a, 66a, 79a).

ARGUMENT

POINT I

The misrepresentations made on the application for life insurance were material as a matter of law.

In their brief, appellants argue that Judge Bruchhausen improperly found that the misrepresentations made by Mr. Solomon were material as a matter of law (App. Br. 6-12). This argument is answered by a long and consistent line of authority established by this and other federal courts, as well as the courts of the State of New York.* (See pp. 13-16, *infra*.)

In attempting to avoid the impact of these authorities on their position, appellants make three arguments: first, that the evidence was insufficient to establish that the insured, Herbert Solomon, in fact had the heart disease which he was diagnosed as having on his discharge from the hospital (App. Br. 10-12); secondly, that there was no evidence on the issue of materiality apart from the Medical Director's statement that he would not have issued the policy had he known the truth of the insured's condition (App. Br. 6-10); and finally, that under the New York Insurance Law, the insurance company was obliged to prove that it had declined to issue policies to other applicants in similar circumstances (App. Br. 7). These three arguments are without merit.

A material misrepresentation made by an applicant for a life insurance policy, relied upon by the insured, justifies the recission of that policy by the insurer. *Trawick* v. *Man-*

*New York substantive law applies since this is a diversity action arising under an insurance policy applied for in New York wherein the beneficiary and the insured were both New York domiciliaries. *Fleet Messenger Service, Inc.* v. *Life Insurance Co. of North America*, 315 F.2d 593 (2d Cir. 1963).

hattan Life Insurance Co. of N.Y., N.Y., 447 F.2d 1293 (5th Cir. 1971); *Mutual Life Insurance Co. of N.Y.* v. *Hilton Green*, 241 U.S. 613 (1916). This principle is recognized by a statute in New York which provides that "no misrepresentation shall avoid any contract of insurance or defeat recovery thereunder unless such misrepresentation was material."*

While the question of materiality, as defined in Section 149(2) of the New York Insurance Law, is at times a question of fact, there are, of course, cases in which "the facts misrepresented [are] so serious that their very seriousness would establish their materiality as a matter of law." *Guiliani v. Metroplitan Life Insurance Co.*, 269 App. Div. 376, 382, 56 N.Y.S.2d 475 (4th Dept. 1945); *Rannellucci* v. *John Hancock Mutual Life Insurance Co.*, 200 Misc. 1111, 1113, 112 N.Y.S.2d 94 (City Court of Albany 1951).

In the case under review, the insured, Mr. Solomon, failed on three separate occasions to answer truthfully questions which, if answered accurately, would have revealed that he had suffered from intermittent chest pains for over fifteen years prior to applying for the policy in question, that during that period he had frequently consulted with physicians and had undergone numerous electrocardiogram examinations because of this condition and that he had been hospitalized and diagnosed to have been suffering from arteriosclerotic heart disease with angina pectoris, shortly before applying for the policy in question (*supra*, pp. 7-10). The authorities are clear that misrepresentations made by Mr. Solomon in his application are so serious as to be material as a matter of law.

In *Arcese* v. *Equitable Life Assurance Society*, 32 Misc. 2d 410, 223 N.Y.S.2d 95 (Sup. Ct. Queens County 1961), an applicant for life insurance failed to disclose on his application that prior to applying for life insurance, he

* N.Y. Insurance Law § 149(2) (McKinney 1966).

had consulted with and had been treated by a physician for chest pains and shortness of breath. He also failed to disclose that prior to his application, he had been hospitalized complaining of chest pains and upon admission had been tentatively diagnosed as suffering from coronary thrombosis. Undisclosed also was the fact that during his hospital stay, he had undergone electrocardiogram and chest x-ray examinations and upon discharge was diagnosed as suffering from "coronary insufficiency, angina in origin, angina pectoris." 32 Misc.2d at 412. Thus, the substance and pattern of the misrepresentations in *Arcese* were almost precisely those at issue in the case at bar and the court held those misrepresentations to be material as a matter of law.

In *Arcese*, the Assistant Medical Director of the insurer testified, as the Medical Director of the insurer attested in the case at bar, that if the questions on the insured's application had been answered truthfully, thereby exposing his true medical history, the insured's application would not have been approved. Significantly, the court did not feel the need to rely on this testimony, however, as it went on to say that:

> "Notwithstanding this fact, the misrepresentations made by the insured are of so serious a nature—ones that go to the core of the insurer exercising his right to accept or reject the application for this insurance policy on the basis of the true state of the insured's health, or the insurer's estimation of how long the insured will live—as to be material as a matter of law." 32 Misc.2d at 414.

In *Wageman* v. *Metropolitan Life Insurance Co.*, 24 App. Div.2d 67, 263 N.Y.S.2d 915, (1st Dept. 1965), the court held that failure to disclose treatments for mild intermittent hypertension constituted a material misrepresentation as a matter of law. In holding the misrepresentations material as a matter of law, the court stated:

> "Of hypertension, even if mild and intermittent, one may assert that anyone of mature experience would know, and a court too must take judicial notice, that it is a condition of substantial medical concern because of its obvious relation as a suspect symptom or as a cause of future complicating degenerative cardiac and circulatory diseases . . . ." 24 App. Div. 2d at 69-70.

In *Metropolitan Life Insurance Co.* v. *Cohen*, 96 F2d 66 (2d Cir. 1938), this Court reversed a decision favoring a claimant under a life insurance policy on the ground that the insured had made material misrepresentations of the same nature as those made by Mr. Solomon. In *Cohen*, the insured denied that he had ever suffered from any disease or ailment of the heart or that he had consulted any physician within the five previous years. In point of fact, the insured had been treated at a hospital by three doctors within a period of one and a half years prior to making his application and had been diagnosed to have been suffering from angina pectoris by one doctor and coronary thrombosis and "Buerger's disease" by the other two. The court stated:

> "He had been treated for angina pectoris which is a symptom of cardiovascular disease, coronary thrombosis, and Buerger's disease, in which the opening of an artery is narrowed, resulting in insufficient blood supply, vascular disturbances, and degeneration." 96 F.2d at 68.

On the subject of materiality of the misrepresentations, the court stated that "The answers to the questions referred to were false representations of material facts and should avoid the policy for it constituted a fraud." 96 F.2d at 67, 68.

Other relevant cases in which failure to disclose heart ailments and treatment therefor has been considered so

serious as to be held material as a matter of law are: *Ettman* v. *Equitable Life Assurance Society of U. S.*, 6 App. Div. 2d 697, 174 N.Y.S.2d 310 (2d Dept. 1958) (insured failed to disclose a history of angina pectoris and hospitalization, electrocardiograms and consultations with three doctors regarding his heart condition); *Vander Veer* v. *Continental Cas. Co.*, 34 N.Y.2d 50, 356 N.Y.S.2d 13 (1974) (insured neglected to disclose a cardiac abnormality and treatment and medication received therefor); *Union Trust Co. of Maryland* v. *Kansas City Life Insurance Co.*, 300 F.2d 606 (4th Cir. 1962) (insured did not disclose chest pains, difficulty breathing, EKG examinations and a diagnosis of coronary disease); *Gruskin* v. *New York Life Insurance Co.*, 33 F. Supp. 21 (W.D. Pa. 1940) (insured did not disclose shortness of breath, pain in the heart and in one arm, and a diagnosis of angina and insufficiency and degeneration of the heart muscle); *Sun Life Assurance Co. of Canada* v. *Maloney*, 132 F.2d 388 (5th Cir. 1942) (insured did not disclose treatment for disease of the heart, an EKG examination and suspected diagnosis of mild coronary occlusion); and *Kosierowski* v. *Madison Life Insurance Company*, 31 App. Div.2d 930, 298 N.Y.S.2d 910 (2d Dept. 1964) (insured neglected to disclose that he had been suffering from hypertension and had been treated by a physician for this condition).

The first argument raised by appellants in an effort to avoid the impact of these cases—that the diagnosis of arteriosclerotic heart disease with angina pectoris may not have been accurate—was disposed of by this Court in *Fleet Messenger Service, Inc.* v. *Life Insurance Co. of North America*, 315 F.2d 593 (2d Cir. 1963). In that case, the insured, in response to questions put to him by the insurer's examining physician, denied that he had ever experienced disease of the heart, blood or blood vessels or coronary

disease, chest pain or discomfort. After his death, the insurer discovered that the insured had had a history of chest pains during the three or four years prior to his application, that he had consulted with and had been treated by a physician for his chest pain, and that the physician had tentatively diagnosed his condition as "arteriosclerotic heart disease with anginal syndrome." 315 F.2d at 595.

The Second Circuit affirmed a judgment notwithstanding the verdict handed down by the District Court of the Southern District of New York holding that the insured's misrepresentations were material as a matter of law and dismissing the plaintiff's claim for benefits under the policy despite the argument made on behalf of the insured that the tentative diagnosis had not been demonstrated to be accurate.

In so holding, this Court relied on Section 149(4) of the New York Insurance Law. That provision provides, in part, as follows:

> "A misrepresentation that an applicant for life, accident or health insurance has not had previous medical treatment, consultation or observation, or has not had previous treatment or care in a hospital or other like institution shall be deemed for the purpose of determining its materiality, a misrepresentation that the applicant has not had the disease, ailment or other medical impairment for which such treatment or care was given or which was discovered, by a licensed practitioner as a result of such consultation or observation."

The court found this provision to mean what it says: that the insured is deemed as a matter of law to have had the disease for which he was treated when he has concealed the treatment from the insurer. Accordingly, the

insured's failure to disclose treatments for his arteriosclerotic heart disease with anginal syndrome was deemed to be a misrepresentation of this physical condition regardless of whether or not the physician was correct in his diagnosis. Similarly, in the case at hand, the seriousness and the effect of Mr. Solomon's misrepresentations may not be avoided by appellants' attempts to discredit or second guess the diagnosis of his treating physician. The same conclusion was reached by this Court, following elaborate analysis of Section 149(4) of the Insurance Law by Judge Learned Hand, in *Ketchum & Co., Inc.* v. *State Mutual Life Assur. Co.*, 162 F.2d 977 (2d Cir. 1947), which was followed by the New York Court of Appeals in *Tolar* v. *Metropolitan Life Ins. Co.*, 297 N.Y. 441 (1948) and by the Appellate Division in *Ettman* v. *Equitable Life Assurance Society of U. S., supra.*

Appellants' argument that the record below was bare of evidentiary support for a finding of materiality ignores the case law referred to above finding almost identical misrepresentations to be material as a matter of law. *Arcese* v. *Equitable Life Assurance Society, supra; Metropolitan Life Insurance Co.* v. *Cohen; supra; Ettman* v. *Equitable Life Assurance Society of U. S., supra; Fleet Messenger Service, Inc.* v. *Life Insurance Co. of North America, supra.* However, it also ignores a significant part of the record. Thus, the affidavit of the physician who is the insured's Medical Director not only sets forth his statement that had he known the true nature of the insured's condition, he would not have recommended issuance of the policy. The affidavit also sets forth the medical facts concerning the insured's heart disease which formed the basis for that statement and appellants have at no time disputed those facts. Thus, Dr. McCracken established without dispute that (R. 31a-32a):

> "Arteriosclerotic heart disease is a condition of the arteries which supply blood to the heart. It is characterized by a hardening and thickening of artery walls accompanied by a loss of elasticity, all of which result in a reduction of the nourishment which goes to the heart. Angina pectoris is chest pain which arises suddenly and intermittently as a result of an increased demand by the heart, which cannot be met due to the thickening and hardening of the arteries. Other symptoms of arteriosclerotic heart disease are dyspnea, which means shortness of breath or labored breathing, and palpitation, which is a fluttering of the heart or an abnormally rapid beating of the heart which is felt by the patient. Class II-B means that although the patient may have some symptoms, he need not restrict his normal daily activity. A medical history which includes a diagnosis of arteriosclerotic heart disease with angina pectoris is directly relevant in determining how long a patient is likely to live. Other terminology often employed to indicate the same condition includes coronary heart disease and coronary insufficiency."

Clearly, failure to disclose facts which bear directly on the life expectancy of an applicant for life insurance is a failure to disclose facts material to the decision as to whether a life insurance policy should issue. Given the undisputed (and indisputable) facts set forth by Dr. McCraken and the case law with regard to arteriosclerotic heart disease with angina pectoris set forth above, Judge Bruchhausen was clearly correct in finding the insured's misrepresentations material as a matter of law.

Appellants' final argument, that it was incumbent on the insurance company to demonstrate that it had never issued a policy of life insurance to applicants under similar circumstances, relies on a misinterpretation of Subdivision 3 of Section 149 of the New York Insurance Law.

That Subdivision provides:

> "In determining the question of materiality, evidence of the practice of the insurer which made such contract with respect to the acceptance or rejection of similar risks shall be admissible."

On its face, the statute provides simply for the admissibility of evidence. It does not make evidence of practice determinative of the question of materiality. Nor do appellants cite any case law supporting such a rule.

What case law is cited by appellants in support of their arguments on materiality is of little assistance to them. *Bean* v. *Metropolitan Life Insurance Co.*, 7 Misc.2d 1044, 166 N.Y.S.2d 814 (Sup. Ct. Warren County 1957) and *Lau* v. *Guardian Life Insurance Co.*, 78 Misc.2d 332, 355 N.Y.S.2d 950 (Civil Court, New York 1974) so far from supporting appellants' position defeat it, since in those cases the courts found the misrepresentations to be material as a matter of law.

In *Tierney* v. *Travellers Insurance Co.*, 179 Misc. 604, 39 N.Y.S.2d 648 *aff'd* 267 App. Div. 804, 47 N.Y.S.2d 288 (4th Dept. 1943), the decisions fail to reveal what the misrepresentations at issue were. The decisions in *Roth* v. *Equitable Life Assurance Society of the United States*, 186 Misc. 612, 50 N.Y.S.2d 119 *aff'd.* 269 App. Div. 746, 55 N.Y.S.2d 117 (1st Dept. 1947) are similarly deficient. Moreover, in the latter case the insurer produced affidavits of three doctors regarding the insured's medical history. All of these affidavits were later revised. The insurer then produced an affidavit of its assistant medical director stating that had he known the facts disclosed in the *original* affidavits of the doctors, he would have rejected the application. The insurer did not, however, produce such an affidavit from the assistant medical director regarding the revised affidavits of the three doctors.

Appellants' reliance on *Orenstein* v. *Metropolitan Life Insurance Co.*, 18 A.D.2d 1016 (2d Dept. 1963) (App. Br. 11), is likewise misplaced. In *Orenstein*, the two physicians who had treated the insured had formulated no fixed diagnosis that the decedent had any heart impairment. Understandably, the court held that under the circumstances, the insured's condition was debatable and therefore a question of fact arose as to whether he had made a material misrepresentation with regard to his physical condition and treatment therefor.

The *Orenstein* case is among those relied on by the Appellate Division in its Memorandum Decision in *Peterson* v. *New England Mutual Life Insurance Co.*, 33 A.D.2d 547, 304 N.Y.S.2d 847 (1st Dept., 1969), a case cited by appellants for the proposition that they are entitled to discovery prior to a finding of materiality as a matter of law. Clearly where, as here, there can be no dispute as to the misrepresentations made or as to the significance of those misrepresentations in the process of determining whether a policy of life insurance should issue, there is no point to the citation of authorities involving disputes as to the nature of the insured's non-disclosures.

POINT II

The court below properly held that National Life did not have prior notice of the insured's true medical history.

Appellants argue that since National Life, through its own investigation, discovered before issuing Mr. Solomon's policy the name of one of Mr. Solomon's physicians and learned from him that Mr. Solomon had visited him for check-ups and one EKG, the results of which were all normal, it was put on notice of his other doctors, his hos-

pitalization, his arteriosclerotic heart disease, his angina pec ris and other symptoms of his heart disease. The argument was properly rejected by the court below.

In April of 1973, after learning of the existence of one of Mr. Solomon's physicians through its own investigation, National Life forwarded a form to that physician, Dr. Karl Friedman, on which he was asked to describe his treatment of Mr. Solomon. On this form, Dr. Friedman did not disclose all of Mr. Solomon's visits to him but did disclose that during the course of two examinations, Mr. Solomon's heart was found to be normal and that one EKG test performed had produced normal results (Ap. Br. 3).

Thereafter, the insured stated in an amendment to his application that he had consulted Dr. Friedman "for check-ups and minor complaints from 1961-1972 and that the results of all such examinations were normal" (*Ibid*).

Appellants' argument is that this information, which indicated no cardiac problem whatsoever, put National Life on notice as to Mr. Solomon's true cardiac condition, his hospitalization, his angina and his diagnosed arteriosclerotic heart disease. The law is flatly to the contrary. *Fleet Messenger Service* v. *Life Insurance Co. of North America, supra; Cherkes* v. *Postal Life Insurance Company*, 285 App. Div. 514, 138 N.Y.S.2d 788 *aff'd.* 309 N.Y. 964, 132 N.E.2d 328 (1956); *Berlin* v. *Assoc. Hosp. Serv.*, 60 Misc.2d 767, 303 N.Y.S.2d 553 (Sup. Ct. N.Y. County 1969).

In *Fleet Messenger*, the insurer received back from a doctor whose name had been disclosed a report indicating an EKG test which was negative but also indicating that the insured had been suffering from vague chest pains. Nevertheless, the Second Circuit Court of Appeals held that the insurer could not be deemed to have had prior notice of the insured's diagnosed arteriosclerotic heart

disease with anginal syndrome. In writing the opinion of the court, Chief Judge Lumbard stated:

> "The defendant (insurer) had received, so far as it knew, complete reports from all the doctors who had treated . . . (the insured); it had no reason to suspect that there was anything more serious which was unrevealed." 315 F.2d at 598.

Judge Lumbard then cited the *Cherkes* case, *supra*, to state that:

> "Knowledge that the insured was not a favorable risk did not cast the burden upon defendant of looking suspiciously and searchingly beyond the facts disclosed for undisclosed ailments . . ." *Ibid.*

In *Cherkes*, a case in which the insured had furnished the name of his personal physican and the hospital in which he stated he had been treated for another ailment, the court held that the insurer was not put on notice of the insured's hospitalization for a kidney condition by reason of the fact that an inquiry made to his physican or the hospital would have revealed this hospitalization. The Court stated "Plaintiff may not shift the burden of truthfulness which was upon the insured into a burden of distrust and additional inquiry on the part of defendant." 285 App. Div. at 516.

In *Berlin* v. *Assoc. Serv., supra,* an insured answered questions on an application for insurance indicating that he was in good health and had suffered no ailments but also listing the name and address of a physician whom he claimed to have seen for a "checkup". Had the records of this doctor been examined, they would have indicated that the insured had in fact been previously hospitalized for evaluation of four years of abdominal pain. The Court held, however, that disclosure of the insured's physician did

not put the insurer on notice of his true medical condition. Citing *Cherkes*, it noted that the insurer was entitled to rely upon the insured's representations.

In spite of the precedents set out above, appellants argue that National Life was put on notice of Mr. Solomon's true medical history relying on *Columbian National Life Insurance Co.* v. *Rodgers*, 116 F.2d 705 (10th Cir. 1941).* However, the facts of that case are entirely inapposite.

In *Columbian National*, the insured stated falsely on his application for life insurance that he had never been declined insurance upon any other application. Before issuing a policy to this individual, the insurer retained an investigating service to look into his background. The investigating service reported back that the applicant had previously applied to another company for insurance and that company had compiled an adverse record concerning the applicant. The investigating service further indicated that there were unusual circumstances involved and that the insured's application with the other company might well have been declined. Quite understandably under these circumstances, the court held that the insurer should have inquired as to whether the investigation was correct and it was charged with notice that there had been a previous

* *Zeldman* v. *Mutual Life Insurance Co. of New York*, 269 App. Div. 53, 53 N.Y.S.2d 792 (1st Dept. 1945) also cited by appellants offers no support for their position. In that case, the court found no notice to the insurance company as to an operation for removal of the insured's spleen by disclosure of "treatments and operation for intestinal disturbance." The court then stated:

> "Unless we are to say that an insurance company must discredit positive affirmations of good health made when the policy is issued, and look suspiciously and searchingly upon every statement it receives concerning subsequent illnesses so as to ascertain whether such illnesses might possibly have had their inception early enough to disclose falsity of the earlier affirmations, this record presents no evidence of waiver. As we conceive the rule, no such burden is placed on the company." (269 App. Div. at 58.)

denial of insurance. Clearly, *Columbian National* has no bearing on the case at bar.

In a final effort to bolster their argument that National Life was actually on notice of the insured's heart condition, appellants attempt to find an awareness of the risk presented by his condition from the bare fact that the policy was backdated.* Based on this fact alone, they speculate that a second annual premium would have been collected on the policy's anniversary date rather than one year from the date of actual issuance and that an overcollection of premium suggests an awareness of the actual risk presented by the insured. The argument is based entirely on speculation and is surely insufficient to withstand a motion for summary judgment.

What the argument ignores is the undisputed fact that the policy was backdated at the request of the insured (R. 6a, 13a, 77a). Moreover, appellants can point to nothing in the policy to indicate that a second annual premium would have been collected prior to one year from the date of actual issuance.** Finally, it offends common sense to suggest that an insurance company would proceed by such devious means to collect a premium from its insured which was obviously available to it by the more usual, direct means.

---

* The backdating, appellants argue, "creates the possibility that the insurance company was on notice" (App. Br. 15).

** Indeed, the insurance company's internal billing and accounting records indicate the contrary (R. 77a).

POINT III

The court below correctly held that, in light of the terms of the insurance policy, inquiry into the alleged knowledge of an agent or subagent of National Life was foreclosed.

Appellants argue in their brief that the insured disclosed his true medical history to an agent of National Life and that false answers were inserted on Mr. Solomon's application at his instance (App. Br. 16-20). On the basis of these assertions, appellants then argue that the alleged knowledge of this agent should be imputed to National Life. This argument has no merit, for while National Life denies that disclosures regarding the insured's true medical history were made to the insurance agent taking his application, provisions in Herbert Solomon's policy restricting the authority of the agent and consistent case law interpreting those provisions foreclosed inquiry into any alleged knowledge or statements of this agent as a matter of law.

Part A of the National Life application signed on March 20, 1973 by Herbert Solomon contained the following provision directly above his signature:

> "The agent taking this application has no authority to make, modify, alter or discharge any contract hereby applied for, nor to extend credit on behalf of the Company. No statement made to or information acquired by any representative of the Company shall bind the Company unless set out in writing in parts A or B of this application." (R. 71a, 74a, App. Br. 16).

Part A of Herbert Solomon's application, including the above quoted clause, was attached to and constituted a part of Mr. Solomon's policy when it was issued. (R. 71a). It is a well established rule of law in New York that a pro-

vision in an application for life insurance which limits the authority of an agent to bind the insurer through his knowledge or representations is a valid and effective one, if the application is attached to the policy when issued. *Axelrod* v. *Metropolitan Life Ins. Co.*, 267 N.Y. 437 (1935); *Abbott* v. *Prudential Ins. Co.*, 255 App. Div. 677, 8 N.Y.S.2d 957, *aff'd.* 281 N.Y. 375, 24 N.E.2d 87 (1939); *Gondolfo* v. *New York Ins. Co.*, 68 Misc.2d 961, 328 N.Y.S.2d 457 (Sup. Ct. Rockland County 1971). It is furthermore a well settled rule that when such a clause is attached to a policy, controversy as to representations made by or information received by an agent is "foreclosed". *Bible* v. *John Hancock Mutual Life Ins. Co.*, 256 N.Y. 458, 464 (1931); *Abbott* v. *Prudential Ins. Co.*, *supra*, p. 380, *Tuminelli* v. *Prudential Insurance Co.*, 24 N.Y.S.2d 306 (Sup. Ct., App. Term, 2d Dept. 1941); *Brauman* v. *Prudential Ins. Co. of America*, 157 N.Y.S.2d 631, 632 (Sup. Ct. Dutchess County 1956); *Riviello* v. *Prudential Insurance Co. of America*, N.Y.L.J., July 11, 1975 at 13 (Sup. Ct. Queens County 1975).

In the case of *Karp* v. *John Hancock Mutual Life Insurance Co.*, 206 Misc. 754, 137 N.Y.S.2d 7 (Sup. Ct., App. Term, 2d Dept. 1955), the court held that it was error for the trial Court to allow admission of testimony regarding representations and knowledge of an insurance company's agent when an application for life insurance specifically provided that such representations and knowledge would not bind the company. The court stated,

> "The restrictions upon the authority of the defendant's agents, stated in the application signed by the insured and attached to the policy, foreclosed any controversy arising out of the representations alleged to have been made by the agents or the agents' alleged knowledge of the insured's condition prior to the issuance of the policy." 206 Misc. at 754.

In the more recent case of *Gam* v. *Equitable Life Assurance Soc. of U.S.*, 67 Misc.2d 724, 325 N.Y.S.2d 241 (Sup. Ct., Special Term, Bronx County 1971), a clause similar to the one in question herein was given effect and an insurer was given summary judgment against an individual claiming under a policy of life insurance. In this case, a negative answer was made to a question asking whether the applicant had had treatment at any time for brain or nervous disorder. It was admitted at the trial that there were five confinements of the insured involving brain or nervous disorder prior to his application for the policy, but the claimant asserted that disclosure had been made to the agent who filled out the application. The court held that such disclosure was irrelevant, stating that:

> "By the terms of the policy these factors are excluded from consideration. It must be assumed (that) assured read the application. . . . (*Minsker* v. *John Hancock Mut. Life Ins. Co.*, 254 N.Y. 333; *Axelroad* v. *Metropolitan Life Ins. Co.*, 267 N.Y. 437." 67 Misc.2d at 725.

One final case of significance is *Lau* v. *Guardian Life Ins. Co. of America, supra,* which involved a suit by a widow to recover under a life insurance policy issued on the life of her husband. In *Lau,* the insurer defended on the ground that the insured had failed to disclose a visit to a physician which had indicated a possible tumor of the liver, and that this was a material misrepresentation. The plaintiff alleged, however, that oral disclosure had been made to the insurer's agent.

The application for the policy in *Lau* contained express language, proximately above the insured's signature, that insured's agent had no authority to bind the company by accepting information from the applicant and that he possessed no authority to waive defenses on behalf of the company. The court upheld the effectiveness of this clause and rendered a directed verdict for the insurer, holding that,

> "Upon the evidence before this Court the application prohibition against waiver or imputation by an agent was valid and binding upon the decedent. 'Controversy is foreclosed if the application is annexed' at the time of policy delivery, irrespective of whether the applicant read the application or knew its contents. (*Bible* v. *John Hancock Mut. Life Ins. Co.*, 256 N.Y. 458; *Lampke* v. *Metropolitan Life Ins. Co.*, 279 N.Y. 157; *Abbott* v. *Prudential Ins. Co.*, 281 N.Y. 375, 379, 380, 384.) . . .
>
> "In the present case, where the application was annexed to the policy at the time of delivery, the question as to whether the decedent revealed the physician's visit to the selling agent becomes irrelevant as a matter of law, and therefore raises no question of fact for the jury." 78 Misc.2d at 335-6.

While appellants acknowledge the rule set forth in the cases cited above (App. Br. 17-18), they argue that in spite of that rule, National Life should be charged with the alleged knowledge of its agent in this case since, they argue, the false answers on Mr. Solomon's application were inserted with the "encouragement" of National Life's agent. This argument has no foundation either in law or in fact.

Appellants base their argument on an affidavit prepared for the action below, in which appellant Irene Solomon, Herbert Solomon's wife and the beneficiary of his policy, alleged that Mr. Irving Aaronson, who took Mr. Solomon's application, knew of Mr. Solomon's angina pains and hospitalization and that in relation to his application had told Mr. Solomon, in substance, to "forget it" or "don't worry about it."* It is difficult to see what "encouragement" can

* There is no indication of precisely where and when Mr. Aaronson was supposed to have been apprised of Mr. Solomon's true medical history and where and when he allegedly made his statements to Mr. Solomon. Further, it would appear from Mrs. Solomon's affidavit that she was not present when these alleged disclosures and statements were supposedly made. (R. 60a, 61a)

be found in the scantily portrayed conversation between the agent and the insured.*

In any event, faced with the established rules of law discussed above, appellants have based their argument entirely on *Sternaman* v. *Metropolitan Life Insurance Co.*, 170 N.Y. 13 (1902). Appellant's reliance on *Sternaman* is misplaced as no logical parallel may be drawn between that case and the case at hand. Further, as indicated below, *Sternaman* has "ceased to be authority" in the courts of this State. *Minsker* v. *John Hancock Mutual Life Insurance Co.*, 254 N.Y. 333 (1930).

In *Sternaman*, decided before the enactment of Section 142 of the Insurance Law, the applicant for life insurance had made *truthful* answers to all questions asked by the insurer's medical examiner, who failed to record them as given and omitted an important part stating that it was unimportant. The court held that the beneficiary, who was actually present when the questions were asked by the medical examiner, could offer oral evidence that the insured had answered the insurer's medical examiner truthfully in an action brought for policy proceeds. In so holding, the court emphasized that it was through no fault of the insured that the answers as given were not correctly recorded. (170 N.Y. at 23).

In the case at hand, Mr. Solomon untruthfully answered questions on part B of his application when they were

* While Counsel for National Life has been informed by Mr. Aaronson that he did not know of Mr. Solomon's heart condition or his hospitalization at any time prior to his death and that he did not in any way excuse him from making complete disclosure in his application for insurance (R. 76a), the restricting provision in Mr. Solomon's policy as well as statutory and consistent common law authorities cited above dictate that inquiry into alleged knowledge of or statements by Mr. Aaronson are foreclosed as a matter of law.

asked by two medical examiners designated by National Life. Directly above his signature on part B of Herbert Solomon's application appears the language:

> "I have read the answers to the foregoing questions; they are correctly recorded and they are complete and true, to the best of my knowledge and belief." (R. 23a).

It can hardly be said that Herbert Solomon, who gave untruthful answers to questions asked of him by National Life's medical examiners, was as lacking in fault as the applicant in the *Sternaman* case. In any event, the rationale of *Sternaman* was substantially undermined in precedental value by Section 142 of the Insurance Law, referred to below, and by cases interpreting that provision cited above, e.g. *Axelroad* v. *Metropolitan Life Ins. Co., supra* (App. Br. 17).

Further, in *Minsker* v. *John Hancock Mutual Life Insurance Co., supra,* the Court of Appeals referred to the *Sternaman* case and noted that it was decided prior to enactment of Section 58 of the Insurance Law (which later became Section 142 of that statute). It then stated:

> "The Federal Supreme Court adopted a different view and held that a void policy could not be made valid by parol testimony to the effect that the company's agent had knowledge of the true facts and that the answers as written in the application were incorrectly written by the company's agent. (*Northern Assurance Co.* v. *Grand View Building Assn.,* 183 U.S. 308). Section 58 of the Insurance Law, (Laws of 1906, ch. 326) reads in part: 'Every policy of insurance issued or delivered within the state on or after the first day of January, nineteen hundred and seven, by any life insurance corporation doing business within the state, shall contain the entire contract between the parties and nothing shall be incorporated therein by reference . . . unless the same are indorsed upon or attached to the policy

when issued. . . . Any waiver of the provisions of this section shall be void.'

"After the enactment of that statute, the case of *Sternaman* v. *Metropolitan Life Ins. Co.* (*supra*), and others to the same effect, *ceased to be authority* upon the question in an action upon a life insurance policy issued by a 'life insurance corporation doing business within the state' when a copy of the application was indorsed upon or attached to the policy. The statutory rule superseded the court-made rule." 254 N.Y. at 337. (Emphasis supplied)*

Conclusion

The Order and Judgment which granted summary judgment to plaintiff-appellee National Life Insurance Company pursuant to Rule 56 of the Federal Rules of Civil Procedure should be affirmed.

Respectfully submitted,

LeBoeuf, Lamb, Leiby & MacRae

LeBOEUF, LAMB, LEIBY & MACRAE
Attorneys for Plaintiff-Appellee
National Life Insurance
Company
Office and P.O. Address
140 Broadway
New York, New York 10005
(212) 269-1100

Of Counsel:

CHARLES P. SIFTON
JAMES A. FITZPATRICK, JR.

Dated: New York, New York
September 29, 1975

---

* In this regard, note might also be taken of *Gondolfo* v. *New York Life Insurance Co.*, *supra*, and *Axelroad* v. *Metropolitan Life Insurance Co.*, *supra*, which, referring to Section 58 of the Insurance Law, held:

"That statute destroyed the foundation for the application of the doctrine of the *Sternaman* case to life insurance policies issued thereafter and the doctrine fell with the structure of its foundation." 267 N.Y. at 445.

Certificate of Service

I hereby certify that I have served the foregoing Briefs of Plaintiff-Appellee National Life Insurance Company upon Rivkin, Leff & Sherman, 55 North Ocean Avenue, Freeport, New York 11520, attorneys for Defendants-Appellants Irene Solomon and Louis Schuster as trustee of the S&L Pension Trust-R.T.B. Industries, Inc., by placing 2 copies of the brief in the United States Mails, first class postage prepaid.

Dated at New York, New York, this 29th day of September, 1975.

David R. Poe

Of Counsel